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A Counter-pedagogy for Social Justice: Core Skills for Community Lawyering

Shin Imai
Osgoode Hall Law School of York University, simai@osgoode.yorku.ca

A COUNTER-PEDAGOGY FOR SOCIAL JUSTICE: CORE SKILLS FOR COMMUNITY-BASED LAWYERING

SHIN IMAI*

An important component of lawyering for social justice is working in communities. In addition to conventional skills, such as legal analysis and litigation, community-based lawyers need skills not taught in the mainstream curriculum. This article describes a counter-pedagogy for teaching students three core skills for community lawyering: how to collaborate with members of the community; how to acknowledge personal identity, race and emotion; and how to take a community perspective on legal problems. The author argues that these skills cannot be taught in isolation, but should be integrated into the teaching itself, including the teaching of substantive areas of the law. He suggests, for example, that students are more likely to learn how to collaborate if the entire clinical course is based on a collaborative approach, rather than having a special class dedicated to "collaboration." The article includes descriptions of techniques and exercises used at Osgoode Hall Law School in the Intensive Programme on Poverty Law at Parkdale Community Legal Services and in the Intensive Programme in Aboriginal Lands, Resources and Governments.

The town of Moosonee is located at the southern tip of Hudson Bay. It is connected to the nearest highway, a couple of hundred kilometres to the south, by the "Polar Bear Express" – a rickety train so named to attract tourists, there being, in fact, no polar bears in Moosonee. An Indian reserve is located across the river on Moose Factory Island. Freighter canoe taxis, operated by local First Nation drivers, ferry people back and forth from spring until "freeze-up" in the fall. In the winter, there is a two-lane ice road marked by trees half buried in the snow. During ice freeze-up in the fall and ice break-up in the spring, the only connection between the communities is by helicopter. Over 90 percent of the population in Moosonee-Moose

* Associate Professor, Osgoode Hall Law School, York University, Toronto, Canada. Former Academic Director, Parkdale Community Legal Services and Co-director, Intensive Programme in Aboriginal Lands, Resources and Governments. I wish to thank my research assistants, Sandra Grant, Ilwad Jama and Brena Parnes for their contributions. I also wish to thank Stephen Ellmann and the participants at the Clinical Theory Workshop at New York Law School in April, 2001; those attending the UCLA/IALS Fifth International Clinical Conference in November 2001; and my colleagues Kathy Laird, Judith McCormack and Janet Mosher for their suggestions.

Factory is Aboriginal.

After my call to the bar in 1980, I became a staff lawyer at Keewaytinok Native Legal Services, a legal aid clinic that served the six First Nation communities on the James Bay coast. Two of us, both lawyers from Toronto, set up shop in a recently-converted fish plant on the banks of the Moose River. There were few longtime non-native residents in the Moosonee-Moose Factory area at that time – people who owned the snowmobile shop, the gas station, the hotel, the hardware store, the Chinese restaurant and the Indian craft shop. Other non-natives were temporary residents: school teachers, children's aid workers, nurses, doctors, police and conservation officers. The justice system made itself known once a month when the judge, clerk, Crown lawyers, and defence counsel flew in from down south to set up court in the largest, newest, and almost only brick building in Moosonee – the provincial government complex. Even within this small population of 3,000, there were really two populations, and it was clear which population owned the justice system, and which population was subject to it.

Some of my practice at Keewaytinok Native Legal Services looked quite conventional. I would sit in my office, interview clients, develop case theories and take steps to go to court or an administrative tribunal. For this work, my conventional law school training served me well enough. Another part of my practice, though, involved working with the native leadership on actions aimed at bringing about large-scale change. I learned that conventional legal tools, such as negotiation and litigation, were not enough. Community organizing, media releases, demonstrations and road blockades were all ways of addressing "legal" problems, and lawyers could play different supportive roles depending on the strategy chosen. For these non-conventional roles, the lawyering skills learned at law school were at best of no assistance, and at worst, quite harmful.

The professors had taught me how to read law, how to apply the law to a fact situation, and how to become an instant "authority" on the problems facing my client. I was to be in charge, to decide what strategy to follow, and to do all the thinking and most of the talking. I was taught that it was sometimes easier to be an advocate if the client was made to disappear, because the client might introduce messy facts and emotions which could get in the way of a good legal argument. I learned important skills: to reconstruct events, to restate the law and to package a new reality. These were the skills for what Gerald Lopez calls "regnant lawyering."[1] I had, in effect, been trained to become an

[1] GERALD LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 24 (1992) (observing that lawyers "consider themselves the preemi-

epistemological imperialist: invading, subjugating and transforming other peoples' realities into forms and concepts that made sense in the world of law.

First Nations, however, have not had a good time with imperialists. Over the 14 months that I resided in Moosonee, I was forced to re-think my approach to law, and to re-evaluate the lawyering skills I had brought with me from Toronto.

I. COMMUNITY-BASED LAWYERING

The community-based experiences that I had in Moosonee, and the related issues that I have struggled with subsequently, have been the subject of academic study by many others who have had similar types of practices. Gerald Lopez[2] calls this type of practice "rebellious lawyering" and describes community organizing among immigrants; Christina Zuni Cruz[3] calls it "community lawyering," and recounts her work among the Pueblo; Melanie Abbott[4] makes suggestions for "critical lawyering" for the homeless; Michael Diamond[5] describes "activist lawyering" for tenants; Susan Bennett[6] talks of "long-haul lawyering" for community non-profits; and Andrea Seielstad[7] writes of her five-year collaboration with an activist community organization.

These authors share a general view that "legal problems," especially those associated with subordinated communities, do not necessarily arise from the failure of individuals to live up to appropriate standards of societal conduct. Rather, these "problems" are symptoms of larger failings in the structure of society itself. In order to address these larger problems, which affect entire communities of people, it is necessary to develop broad strategies in collaboration with members of the community. In developing these strategies, however, one must be aware that the process of lawyering itself, and the relationship of the lawyer to the community, can determine whether the lawyer is a force of liberation or an agent of domination. A lawyer in the traditional mode – one who takes charge, applies legal doctrine,

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nent problem-solvers in most situations they find themselves trying to alter").

[2] *Id.*

[3] Christina Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLIN. L. REV. 557 (1999).

[4] Melanie Abbott, *Seeking Shelter Under a Deconstructed Roof: Homelessness and Critical Lawyering*, 64 TENN. L. REV. 269 (1997).

[5] Michael Diamond, *Community Lawyering: Revisiting the Old Neighbourhood,* 32 COLUM. HUM. RTS. L. REV. 67 (2000).

[6] Susan D. Bennett, *On Long-Haul Lawyering*, 25 FORDHAM URB. L. J. 771 (1998).

[7] Andrea M. Seielstad, *Community Building as a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Education*, 8 CLIN. L. REV. 445 (2002).

and uses conventional legal avenues for redress – may bring conventional legal tools to a progressive cause, but the lawyering itself may add to the disempowerment of the group represented.[8] In the words of Ron Chisom, a community organizer, conventional lawyers "have killed off more groups by helping them than ever would have died if the lawyers had never showed up."[9]

II. Teaching in a Community-based Clinical Programme

Two of the clinical programmes offered at Osgoode Hall Law School promote community-based lawyering with an explicit social justice objective. They are both full-term credit programmes which combine physical presence in communities with a formal classroom component.[10]

Parkdale Community Legal Services is located in a low-income, racially diverse neighbourhood in an older section of Toronto. The clinic serves people who earn marginal income, or who receive social assistance. Problems relating to social assistance, tenancies, non-unionized workers' rights and immigration status make up the bulk of the work. Twenty students attend the clinic full-time for a full term. Each student is assigned a workstation with a phone and computer. Each group of five students is supervised by a lawyer and a community legal worker. The community legal workers focus on community organizing and law reform activities,[11] and involve students in their

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[8] *See* Anthony Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 Rev. of Law and Soc. Change 659, 663 (1987-88).

> I shall critique the dominant traditions of poverty law: direct service and law reform litigation. My thesis is that poverty cannot – indeed should not – be remedied by these traditions. Remedial litigation should not be mounted, even where altruistic relief is possible, without the activization of class consciousness among the poor, nor without the political organization and mobilization of the poor.

See also Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 Clin. L. Rev. 427 (2000) (on organizing tenants) and Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 Mich. L. Rev. 821 (1995) (on litigation involving native Hawaiian lands).

[9] Quoted in William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 Ohio N.U. L. Rev. 455, 457 (1995).

[10] Three Canadian law schools – Dalhousie, Windsor, and Osgoode Hall – offer clinical programmes which provide 15 credits for full-time participation in the clinic. At Osgoode Hall, the Intensive Programme in Aboriginal Lands, Resources and Governments awards nine credits on a pass/fail basis, three graded credits for a two-hour seminar and three graded credits for a 30-page research paper. The Intensive Programme in Poverty Law at Parkdale Community Legal Services awards 12 credits on a pass/fail basis, and the remaining three graded credits for a 30-page research paper developed through a weekly three-hour seminar.

[11] The Parkdale clinic is funded under Ontario's *Legal Aid Services Act*, R.S.O. 1990, c.26. Section 33(1) of the Act empowers Legal Aid Ontario to grant funding to a community clinic to provide legal aid services to low-income individuals and disadvantaged communities.

work. Organizing against police abuses, opposing workfare, supporting tenants' rights and the homeless, lobbying on immigration issues and assisting a psychiatric survivor group are among the community activities undertaken at the clinic. The case work, from client interviews to representation at tribunals, is primarily the responsibility of the students who carry 15 to 30 active files at any one time. All the legal work is closely supervised by a lawyer. The student group is much more racially diverse than the law school as a whole, with perhaps 30 percent being people of colour.

The second clinical programme, the Intensive Programme in Aboriginal Lands, Resources and Governments, is a full-term, full-time externship programme. Ten to fifteen law students from law schools across Canada are accepted in the last term of their third year. After a two-week intensive course at the law school, students are sent off for seven weeks to a variety of placements across Canada and the United States. The placements are with First Nation governments, Crown agencies, private law firms, and non-governmental organizations. The work responsibilities at these placements are negotiated prior to the students' arrival and range from community consultations to traditional legal research and litigation support. Students return to the law school for a final two weeks to present a two-hour seminar and write an academic paper. In most years, over half of the students are of Aboriginal ancestry.

Both programmes are based on the philosophy that community-based lawyering involves working with the community, not extracting legal issues from the community for the education of law students.[12] The students are not sent in as tourists. They are expected to contribute to work that is useful to the community.

Students generally do not come into these programmes with the appropriate skills.[13] The conventional curriculum teaches an ap-

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[12] The clinical programmes at the University of New Mexico, which also include a Community Lawyering Clinic and an Indian Law Clinic, appear to share a similar philosophy. Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training,* 7 CLIN. L. REV. 307 (2001). *See also* the description of the Tribal Law Clinic at the University of Arizona in Robert A Williams, Jr., *Vampires Anonymous and Critical Race Practice,* 95 MICH. L. REV. 741 (1997).

[13] Gerald Lopez complains about the limitations of "generic legal education," and suggests a range of skills that need to be taught at law school for students who plan to work with subordinated people:

> Anticipating and responding to the problems of the politically and socially subordinated demands a range of practical know-how and intellectual sophistication that extends beyond litigation competence. It demands knowing how to work with clients and not just on their behalf; it demands knowing how to collaborate with allies rather than ignoring their actual or potential role in the situation; it demands knowing how to take advantage of and how to teach self-help and lay lawyering and not just how to be a good formal representative; and it demands knowing how to be a part of, as

proach to law and lawyering which is, in many ways, incompatible with community-based lawyering. This conventional approach to lawyering is not learned directly through lectures. There is no course called "Advanced Regnant Lawyering." Rather, the way that lectures are given, classes are structured and the law is analysed, communicates a message about the role of the lawyer in delivering legal services that is absorbed by students throughout the curriculum.

In my view, in order to work in community-based clinics, it is necessary to "unteach" some of the lessons of a conventional law school education. For this, a counter-pedagogy is necessary which changes the way that knowledge is gained, alters hierarchies in the class, and provides a community-based analysis of the law. The instructor must integrate the teaching of community lawyering skills throughout the clinical course by teaching substantive law using techniques and exercises that are informed by the counter-pedagogy. It would be counterproductive to hold one class on "collaboration," for example, then revert to conventional lectures to teach areas of substantive law, because the lecture format itself promotes the very hierarchical relationships that need to be changed if the student is to be an effective advocate at the clinic.[14] Unless the pedagogical method is changed, the instructor may be lecturing about collaboration and community lawyering, but in fact teaching the practice of hierarchy and regnant advocacy.

In the next sections of this paper, I describe the three core skills necessary for community lawyering – collaborating with a community (section III), recognizing individuality (section IV) and taking a community perspective (section V). In each section, I discuss why the skill

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> well as knowing how to build, coalitions, and not just for the purposes of the filing of a law suit. In sum, anticipating and responding to the problems of the politically and socially subordinated requires training that reflects (and, in turn, helps produce) an idea of lawyering compatible with a collective fight for social change – a "rebellious idea of lawyering," at odds with the conception of practice that now reigns over legal education and the work of lawyers.

Gerald Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 356 (1989).

[14] Susan Sturm feels that the structure of the learning environment fosters hostility to women law students:

> If law schools structured significant portions of the learning environment so that men and women interacted in task-oriented, interdependent projects, this could create conditions that would reduce bias and promote successful collaboration.

Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL'Y 119, 142 (1997). For a general critique of the structure of law schools, *see* Duncan Kennedy, *Legal Education as Training for Hierarchy,* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 38-58 (David Kairys ed., 2d ed., 1990) (law school is a training ground for entering hierarchical private firms).

is necessary, and outline class exercises and techniques which attempt to transmit that skill. These skills are integrated into the teaching of the substantive law for the clinical course, so that students have an opportunity to experience the application of those skills while learning and analysing legal principles. These classroom techniques and exercises, on their own, cannot make a student a competent community lawyer, any more than a course on litigation can make a student an expert barrister. Years of experience are needed for both. The classroom components can, however, help students identify the skills and knowledge that they will need once they are practising in the community.

III. The First Skill: From Lone Expert to Collaborating with a Community

Before I began my job at Keewaytinok Native Legal Services, I had heard that in criminal proceedings, almost all the local Aboriginal accused readily admitted to the charges and pleaded guilty. As an idealistic young lawyer starting up a new legal aid clinic, I was concerned that Aboriginal people were, for whatever reason, not exercising the right to remain silent. I thought that one of the contributions I could make to the community was to ensure that native people were able to rely upon the same procedural protections as other Canadians. The process for re-thinking my approach to lawyering was initiated fairly quickly when the all-native Board of Directors decided that the clinic would not take on any criminal cases.[15] What I thought was a priority for my contribution to the community was no longer relevant. It came to me that I had, without really thinking about it, assumed that I was an expert on injustice in Moosonee before I had talked to people from Moosonee about their perceptions of injustice.

A. Conventional Teaching

While I cannot blame my professors for the fact that I had made a unilateral assumption of my expertise, the way that I acted was consistent with the way that I was taught. Conventional lectures place the "expert" teacher at the front of the class to impart knowledge.[16] Stu-

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[15] Keewaytinok Native Legal Services was funded by the provincial government, but managed by a community board of directors. Those charged with criminal offences continued to be represented by legal aid lawyers who flew into the community once a month with the court party.

[16] Clifford S. Zimmerman, *Thinking Beyond My Own Interpretation: Reflections on Collaborative and Co-operative Learning Theory in the Law School Curriculum*, 31 Ariz. St. L. J. 957, 976 (1999):

> Teachers have "expert power" that is "based upon the possession of knowledge that another wishes to use to satisfy his needs." The presumption in education is that

dents are placed in passive roles as receptacles of information. They are not expected to contribute anything, except to assist in the elaboration of the professor's theories and teaching strategies.

The conventional lecture format has been called the "transmission model"[17] or the "banking model."[18] It relies on what problem-solving theorists refer to as "well-structured" problems. Well-structured problems are not ambiguous, the information needed to solve them is limited and knowable, and the problems have solutions that are "correct" within a defined level of variance. In law, the variance depends on the interpretation of certain facts, or the application of certain legal principles. To solve a well-structured problem, the individual need only rely upon the logical application of relevant information to the situation.[19]

The problems people face in their everyday lives, however, are not "well-structured." They are quite messy and "ill-structured." The information that is needed to solve these problems (the "problem space") is not clearly bounded; there may be more than one solution; and the problem itself may be amorphous and shifting.[20] Individuals experience everyday problem-solving as "ambiguous, convoluted, and spiraling, [sic] not as linear, sequential, or governed by specific procedures."[21] Problem-solving theorists have discovered that people solve ill-structured problems quite differently from well-structured problems. Rather than applying memory and logic to the task, everyday ill-structured problems draw on much broader, more diverse as-

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information flows in one direction, from teacher to student. [Citations omitted.]

[17] JOHN BRANSFORD & BARRY S. STEIN, THE IDEAL PROBLEM SOLVER: A GUIDE FOR IMPROVING THINKING, LEARNING, AND CREATIVITY (2d ed.) 199 (1993).

[18] *See* PAOLO FREIRE, PEDAGOGY OF THE OPPRESSED (1970) at 57.

[19] *See* Jane Harris Aiken, *Striving to Teach "Justice, Fairness, and Morality"*, 4 CLIN. L. REV. 1, 6 (1997). ("Focusing solely on 'what the law says' also reinforces the idea that lawyers are legal technicians, that the practice of law is merely the exercise of applying fixed neutral rules to a given situation, that justice has no other content than the results that emanate from the application of those rules.") Janet Mosher, current Academic Director of Parkdale Community Legal Services, refers to this as a problem with "individualisation" and "instrumentalism" in *Legal Education: Nemesis or Ally of Social Movements?*, 35 OSGOODE HALL L. J. 613 (1997).

[20] Mary A. Luszcz, *Theoretical Models of Everyday Problem Solving in Adulthood*, in EVERDAY PROBLEM SOLVING: THEORY AND APPLICATIONS 25 (Jan D. Sinnott ed.,1989):

> Well-structured problems might be thought of as 'puzzles'. . .with a single correct answer, arrived at through application of explicit rules comprising part of a production system. . .within a problem space conceived of as a necessarily closed system. . . . Ill-structured problems are more amorphous dilemmas, open to multiple solutions; any particular solution is in large part dependent on the breadth of the problem space.

[21] Diane Lee, *Everyday Problem Solving: Implications for Education,* in Sinnott, ed., *id.* at 251. Lee analyzes the thought processes of three teachers as they made decisions during their classes.

pects of human nature and human relationships. According to problem-solving theorist Mary A. Luszcz,

> Approaches to [everyday] problem solving. . .appear to be highly contextually constrained. Rather than being an exclusively or even predominantly logical exercise, everyday problem solving becomes enmeshed in the subjective social and affective world of adult adaptation. As adults attempt to solve everyday problems, they are confronted with the relative nature of truth, contradictions within and between knowledge systems, and a need to integrate across domains to arrive at workable, if not "correct," solutions.[22]

In Moosonee, I initially followed the problem-solving model that I had experienced in law school for three years. In problem-solving terms, I had merely taken a pre-determined "well structured" problem (the non-exercise of the right to remain silent) and applied the set of rules that I had been told in law school were applicable to the solution (give native people equal access to the exercise of that right). Having the tools to "solve" the problem, as the first lawyer in town, I assumed that I would be the legal expert, and I would tell people about what was just and what was unjust.

If I had viewed community justice issues as ill-structured problems, however, my first task would have been to consider how these problems could usefully be framed. In order to do that, I would have had to meet and collaborate with members of the community.[23]

B. Experiencing Collaboration

If a student can be channelled into taking on the role of being an "expert" through the way the law school class is taught, then it makes sense that a student could be channelled into acting more collaboratively by the way that the clinical class is taught. In order to do this, the structure of the class must be changed.

It is difficult to create the appropriate collaborative environment using the conventional lecture or seminar format where students are allowed to decide whether or not to participate. The structure of the class favours those who like, or are confident enough, to speak, while permitting others who are too intimidated, or too bored, to remain silent. In a more collaborative class, each student would have the space and sense of responsibility for making contributions which will

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22 *See* Luszcz, *supra* note 20, at 35.

23 Two recently published articles show how effectively the problem-solving approach can be used to prepare students for work in a community. Katherine R. Kruse, *Biting Off What They Can Chew: Strategies for Involving Students in Problem-solving Beyond Individual Client Representation*, 8 CLIN. L. REV. 405 (2002) (describing the development of an assisted *pro se* prison service project) and Seielstad, *supra* note 7 (describing involvement with an activist community organization in Dayton).

make the class work.

The problem-solving approach to teaching provides a useful framework for changing the structure and creating an environment of collaboration. Bransford and Stein[24] suggest that the problem-solving approach should begin with a consideration of ill-structured everyday problems. Each problem is approached, not as a given, but as a starting point for an inquiry into the social context in which the problem is embedded.[25] The exploration of the dimensions of the problem is conducted by students working co-operatively in small groups. David Boud and Grahame Feletti describe more far-reaching models in which the entire curriculum is based on "problem-based learning." In these courses, groups of students are given a problem with no prior information and told to research ways to address the problem over the course of the term. The teachers become "tutors" who help the groups with their approach, rather than experts who transmit information.[26]

The collaborative techniques I employ are widely used in clinical circles. The first class begins with simple exercises which get the students talking to each other informally.[27] In subsequent classes, sub-

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[24] *See* BRANSFORD & STEIN, *supra* note 17, and for a more thorough discussion on collaboration *see* Zimmerman, *supra* note 16.

[25] Carrie J. Menkel-Meadow, *When Winning Isn't Everything: the Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 909-910 (2000). She provides an example of the questions that would be asked in analysing a legal problem, which include client goals, underlying needs, and "social, economic, political, psychological, moral, ethical and organization issues." It is obvious from the nature of the questions that this approach requires a much deeper understanding of the factual context than analysis based on the case method. *See also* Linda Morton, *Teaching Creative Problem Solving: A Paradigmatic Approach*, 34 CAL. W. L. REV. 375 (1998) (outlining six phases for analysing problems).

[26] For a description of problem-based learning, *see* THE CHALLENGE OF PROBLEM BASED LEARNING (David Boud & Grahame Feletti, ed., 1991) and for its use at Harvard Medical School *see* LuAnn Wilkerson & Edward M. Hundert, *Becoming a Problem-based Tutor: Increasing Self-awareness Through Faculty Development*, in *id.* at 162:

> . . . when teachers replace lecture with problem-based discussion, students experience a new relationship to one another. No longer is discussion a matter of student response to a teacher question. When working with problem material, students become actively engaged with one another in building understanding, a process that has been compared to that required to raise a barn. . . . They become a team responsible for accomplishing shared goals, one that is characterized by cooperation rather than competition. (Citations omitted.)

For a description of the approach used in a first year class at the University of Waikato in New Zealand, *see* Jacqueline Mackinnon, A Problem Based Learning Approach to Learning Legal Concepts, Processes and Skills (paper presented at the 2001 UCLA/IALS Fifth International Clinical Conference, November 9, 2001).

[27] Introducing a partner:

> Students pair off with someone they do not know. They talk to each other for a few minutes about why they decided to enrol in the clinical programme and tell each other something about themselves that they would like the other students to know. In the Aboriginal Intensive, I ask students to include information on where they

sets of students discuss short problems and present ideas to the class, and work on larger projects together outside of the class.[28] I generally decide on the configuration of the group, and change them for each exercise. Doing this ensures that students get to know each other and that they experience a variety of interpersonal dynamics.

Collaborative exercises involving the whole class are important for creating a feeling for the group. I use a technique based on a circle. After setting out a bare-bones fact situation, I ask each student in turn to ask me a factual question which will help the group understand the dimensions of the problem. A student is allowed to pass, but no one is allowed to go out of turn. The exercise makes structural room for students who are quieter, and it helps give the more talkative students the discipline to remain silent.[29] I also rely on other commonly used techniques, such as group "brainstorming" or having the class comment on a course of action proposed by a smaller group of students.

Some of these techniques may not seem "democratic" in that a student is not given a choice of how to participate. The ideal of a less hierarchical relationship between student and teacher may be contradicted by, for example, requiring students to comment on an issue, or determining the group that they should join. Unless I use a few techniques like these, however, I find it difficult to change the class dynamic sufficiently to create a collaborative structure for students to

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come from and where their parents came from, in order to acknowledge the importance of geography and location. Each student then introduces the partner to the class.

This exercise facilitates students talking to each other, but it also begins the realization that students are responsible for telling the stories of others.

Interviewing another student:

In the poverty clinic, a follow-up exercise is based on the intake form we use to record information on new clients. The students pair up with a student they do not know and ask questions from the interview form. They are told they do not have to answer any questions that they feel uncomfortable answering. The questions can be, of course, quite personal including home phone numbers, income, whom they live with and the value of their assets.

This is another way of students getting to know each other, but it also brings them into shared understandings of what it feels like to be a client interviewed by a student. The contrast between "talking" to a colleague and "interviewing" a client raises questions about students' awareness of their own relationship to the client, and their assumptions about power and class.

[28] At Parkdale Community Legal Services, groups of five students were required to present two-hour seminars on the work in an area of law. These presentations were informative, a lot of fun, sometimes very elaborate and provided great opportunities for group work. The students' presentations were, without fail, very rooted in the lives of the clients and the powerful forces that acted against them.

[29] For two other examples of the use of circles, see the "speaking plain English exercise" and the "facilitation exercise" in Section V, *infra*.

experience.[30]

These techniques are excellent vehicles for allowing groups of students to review and apply legal principles to different fact situations. They are compelled to be engaged in the problem-solving exercise and gain experience articulating the legal principles as well. Clifford Zimmerman claims that this type of collaboration increases the motivation to learn and can result in higher academic achievement:

> The advantages are not only in group interaction, but also in individual achievement, including both individual accountability and learning. The learning advantages extend from basic academic achievement to a complete understanding or mastery of the subject matter. All told, each student reaches a higher level of thinking.[31]

Through the experience of learning collaboratively in class, students should see the value of establishing a collaborative structure for their work in the community. They should realize that collaboration requires more than calling a community meeting, sitting in front of a room, outlining the issue, and asking what people think. Doing that is not really collaborating – it is more or less replicating what happens in a typical law school lecture. Both the community meeting and the law school classroom share a structural problem – there is a lone "expert" on whom others are dependent. In order to create a collaborative environment in the community setting, it is necessary to establish a less hierarchical structure which facilitates interaction by everyone involved.

IV. THE SECOND SKILL: FROM DEPERSONALIZATION TO RECOGNIZING INDIVIDUALITY

In an approach to teaching which relies on well-structured problems, the personal identity and background of the person asked to solve the problem is irrelevant. The assumption is that there is a commonly understood approach to the problem, and a commonly accepted solution. Consequently, in conventional lectures, the problem-solving exercise is enhanced when students are treated as depersonalized units and emotional content is drained from the discussion. According to Patricia Williams,

> As lawyers, we are taught from the moment we enter law school to temper our emotionalism, quash our idealism. Most of us were taught that our heartfelt instincts would subvert the law and defeat

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[30] Other teachers allow students to choose their own pairings. *See* Zimmerman, *supra* note 16 at 1011-1012. Advantages he mentions include respecting student autonomy, and providing for greater comfort among students who already know each other.

[31] *Id.* at 1000.

> the security of a well-ordered civilization; but faithful adherence to the word of law, to *stare decisis* and clearly stated authority, would lead as a matter of course to a bright clear world in which those heartfelt instincts would, like the Wizard of Oz, be waiting. Form was exalted over substance, and cool rationales over heated feelings.[32]

In a community-based practice it would be harmful for law students to replicate their experience of depersonalization by treating their clients as a depersonalized group of "oppressed people." Community-based lawyers must work collaboratively with members of the community, listen to the stories of their clients, and facilitate group dynamics.[33] In order to engage in these tasks effectively, they need an awareness of the effect of income, race, gender, sexual orientation and disability on each individual, because those factors affect both the definition of the problem and the possibilities for resolution. This consciousness of the individuality of the members of the community necessarily brings with it a consciousness of the emotional engagement of those individuals.[34]

The clinical class provides an excellent opportunity to have students learn how to address the issues arising from personal identity and emotional engagement because the class itself will benefit from having those issues addressed with sensitivity.

A. Talking About Personal Identity

Clinical classes can, like other classes, inadvertently transmit as-

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[32] PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 140 (1991).

[33] Paolo Freire describes this broader role of facilitation as one that engages the teacher in collaborative discussions based on concrete situations in local communities.

> The important thing, from the point of view of libertarian education, is for men to come to feel like masters of their thinking by discussing the thinking and views of the world explicitly or implicitly manifest in their own suggestions and those of their comrades. Because this view of education starts with the conviction that it cannot present its own program but must search for this program dialogically with the people, it serves to introduce the pedagogy of the oppressed, in the elaboration of which the oppressed must participate.

FREIRE, *supra* note 18, at 118.

[34] Stephen Ellmann, *Client-Centerdness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1155 (1992). Ellmann reviews the challenges facing a lawyer representing a group seeking social change. In discussing the role of the lawyer when there is a disagreement within the group, he says:

> The process by which the 'negotiating' members find common ground, however, is not simply one of rational exploration. Instead, it also involves emotional orientation. The lawyer who wants to encourage agreement among the members may devote much of her effort to providing the members with a largely emotional reassurance about the possibility of agreement.

sumptions of homogeneity.[35] In discussing race problems, for example, one can talk unconsciously from a majoritarian perspective. Take the uncontroversial statement, "We have not treated Native people fairly." Native students, of course will not feel part of the "we." Neither will recent immigrants. People of colour may also feel excluded and may identify with the group "not treated fairly."

Another way to transmit a homogenized perspective inadvertently is to discuss subordinating "differences" based on race, gender, sexual orientation, economic status, and ability in the context of the justice system as a whole, but not in the context of the students themselves. Whether articulated or not, students are struggling with those issues in every aspect of their clinical experience including in their relationships with other students, interactions with clients, and interactions with officials in the justice system. To students of colour, for example, failing to address race issues in the classroom will have the same air of unreality as colour-blindness in the justice system as a whole.[36] To create an environment which acknowledges these subordinating "differences," there must be an explicit recognition of each student's personal identity. The clinical teacher must take conscious steps to create that environment, as Bill Ong Hing explains:

> Some individuals may view all this as a matter of common sense. But the truth is that most young community lawyers need training on how to respond to personal identification issues. We all have opinions on these matters, but we have had little opportunity to review these issues in the critical format of the classroom. Common sense, without training, is dangerously fashioned by our own class, race, ethnicity/culture, gender, and sexual background. What we think of as common sense may make little sense or even be offensive to someone of a different identification background. Thus, the opportunity to learn and discuss different approaches with the help

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[35] Even clinical scholarship tends to be directed to a white audience notes Margaret E. Montoya in *Voicing Differences*, 4 CLIN. L. REV. 147, 155 (1997):

> How do we expand these methodologies to involve the significant minority of students who do share the outsider characteristics of clients? How do we conduct classroom discussions that begin from the understanding that identities are fluid, multiple, and unstable and in continuous re/construction? How do we counteract the silencing of the students' voices about their lived experiences that is a consequence of their prior education, including most particularly a direct and intended effect of traditional legal pedagogy, especially on outsider students? How do we tap into the diversity of experiences about issues of language loss, class-jumping and diasporic displacements that form the origin of stories of the families of many White, middle-class and heterosexual students?

[36] For example, one of the students at Parkdale Community Legal Services, an African Canadian woman, reflects on the bounds of professional responsibility after she was referred to as "Sambo" in her first interview with a client. *See* Richelle Samuel, *Legal Ethics and Moral Dilemmas: Strategizing Around Race in the Provision of Client Service*, 16 J. L. & SOC. POL. 63 (2001).

> of different perspectives from readings, the opinions of others, and self-critique is unique.[37]

A number of clinicians have described innovative ways to raise issues of identity in their classes. Many of the exercises reach beyond lectures and discussions, in order to elicit an emotional or gut reaction through techniques such as "unbalancing" assumptions, experiential learning, counter-attitudinal advocacy and the use of "outsider narratives."[38] Most of these short exercises juxtapose often subconscious assumptions held by students with an unsettling and different reality.

Personal identity issues can also be introduced through a discussion of clinical practice. For example, after the students at the poverty law clinic have had a chance to interview a few clients, I ask them to write down the answer to the following question:

> Do you have examples of things that clients have said to you about race that made you uncomfortable?

The students answer this question anonymously on a piece of paper. I read out the answers and ask the class why the student may have been uncomfortable. I then ask why the client would have made such a comment.

Of course, the reactions are not only from students of colour. White students are also uncomfortable about comments that reveal

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[37] Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1812 (1993). *See also* Jerome McCristal Culp, *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, in CRITICAL RACE THEORY: THE CUTTING EDGE 409, 410 (Richard Delgado, ed., 1995) ("Who we are matters as much as what we are and what we think. It is important to teach our students that there is a 'me' in the law, as well as specific rules that are animated by our experiences,") and Beverly Balos, *Learning to Teach Gender, Race, Class, and Heterosexism: Challenge in the Classroom and Clinic*, 3 HASTINGS WOMEN'S L. J. 161 (1992).

[38] Susan Bryant, *The Five Habits:Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33 (2001) (on how to approach cases to ensure that students turn their minds to cross-cultural issues); Carolyn Grose, *A Field Trip to Benetton . . . And Beyond: Some Thoughts on "Outsider Narrative" In a Law School Clinic*, 4 CLIN. L. REV. 109 (1997) (on countering "pre-understandings" with narratives); Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, J. DISP. RESOL. 55 (1995) (on how to train mediators to be alive to race issues); Steven Hartwell, *Out of the Closet: Writing to Learn*, in CONTESTED TERRAIN: DIVERSITY, WRITING, AND KNOWLEDGE 151 (Phyllis Kahaney & Judith Liu, ed., 2001) (on addressing gayness); Michelle S. Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE L. REV. 345 (1997) (on addressing race in the clinical setting); Julie Macfarlane, *A Feminist Perspective on Experience-Based Learning and Curriculum Change*, 26 OTTAWA L. REV. 357 (1994) (on the importance of replacing the lecture-exam format with experiential learning); Kimberly E. O'Leary, *Using "Difference Analysis" to Teach Problem-Solving*, 4 CLIN. L. REV. 65 (1997) (on techniques to assess differences in interests and outlooks); and Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in the Law School Clinics*, 2 CLIN. L. REV. 37 (1995) (on teaching the "disorienting moment").

racial bias. So this exercise provides an opportunity for all students to consider how they should react in those situations. The discussion about the clients' motivations invariably raise very sympathetic reactions from the students about the difficulties in the lives of their clients. In the process, students learn to disengage racist comments from the immediate condemnation of the person making those comments, while exploring such issues as the role of racism in economic domination, the perpetuation of racist images in the media and the role of students in combatting racism. During this exercise students often raise other identity issues and discuss the effects of other subordinating "differences."

The acknowledgment of the students' own identities in class will help prepare them to value the personal identities of members of the community and to be sensitive to the larger social context which affects those identities.

B. Talking About Race

My experience at law school was that, to the extent that anyone talked about race, it was in the context of differential treatment. Judging from my students, education on race has not changed much. One characteristic of this discourse is that the terms "racism" and "racist" are very imprecise. In one iteration, racism is a phenomenon that could only occur between a "white" person and a person of colour. Therefore, a Native American police officer could not be racist against an African-American.[39] On the other hand, racism may be used to describe any discriminatory behaviour or derogatory comment made by a member of one "racial" group against another "racial" group. So the hostility of a Korean to a Japanese person, the hostility of an Irish person to the British, or the opinions of an African Canadian judge about the conduct of a white police officer, are all manifestations of the same phenomenon.

This lack of conceptual precision, combined with the common use of the terms as epithets, creates the conditions for an exchange of views which is high in emotional content, but low on intellectual rigour. Such an exchange works against the collaborative, emotionally supportive atmosphere that we are trying to foster.[40]

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[39] *See* Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse,* 77 CORNELL L. REV. 1298, 1314 (1992), where he recounts that view expressed by a judge in a case involving an African-American client.

[40] Hing, *supra* note 37, at 1823, describes some of the difficulties that can arise in class. Although students in the Lawyering Process class are open to the notion that being sensitive to and conscientious about personal identification differences makes for good lawyering, on more than one occasion some students have expressed dissatisfaction with the direction that some discussions have taken, and occasionally feelings

In order to lessen the likelihood of a negative dynamic developing in the class, I try to talk about race in the context of some other topic that can help to anchor the discussion. For example, in the poverty law clinic, I use a racially-charged video clip to discuss race issues in the context of teaching oral advocacy skills. The video excerpt is from a hearing before the Supreme Court of Canada in *R.D.S. v. The Queen*.[41] In this case, an African Canadian youth was charged with three counts: unlawfully assaulting a police officer; unlawfully assaulting a police officer with the intention of preventing an arrest; and unlawfully resisting a police officer in the lawful execution of his duty. The white police officer and the accused were the only witnesses, and their accounts of the events differed widely. The incident occurred in Halifax, Nova Scotia, where there is an unpleasant history of racism against African Canadians.[42]

The trial was held before Nova Scotia's only African Canadian judge, Corrine Sparks. During the proceedings, the prosecutor stated, "There's absolutely no reason to attack the credibility of the officer." In her judgment, Judge Sparks explained why she had found a reasonable doubt, and why she had decided to acquit.

> The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day. At any rate, based upon my comments and based upon all the evidence before the court, I have no other choice but to acquit.[43]

The prosecutor appealed the acquittal on the basis that the judge's remarks showed that she was racially biased against the white police officer. In the video clips, I show a series of oral exchanges between the former Chief Justice of Canada, Antonio Lamer, and the

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have been hurt. Contributing to this dissatisfaction may be the fact that almost everyone, irrespective of personal background, feels that they have had some experience with personal identification differences and, therefore, have an opinion as to how such differences relate to interpersonal relationships.

41 *R.D.S. v. The Queen*, [1997] 151 D.L.R. (4th) 193.

42 *See* CAROL A. AYLWARD, CANADIAN CRITICAL RACE THEORY 93-111 (1999), for a more detailed discussion of this case, and the background of racism in Nova Scotia.

43 Quoted in *id.* at 95.

lawyers for the Black youth during the hearing of the appeal at the Supreme Court of Canada.

Justice Lamer indicates that it is not appropriate for judges to use stereotypes, and begins from his own experience.

> For many, many years when I was a lawyer, I had clients who were Chinese. They were very much into gambling and they are tremendous gamblers. There is actually a problem in Montreal right now that I can take judicial cognizance of . . . the fact that the casino . . . is constantly occupied by people of the Chinese community. Now can I take that into account if a Chinese is accused of . . . some illegal gambling?[44]

At this point I stop the tape and give students an opportunity to formulate a reply. I then run the tape, and we have an opportunity to discuss how counsel actually responded to the question. I continue the tape as Justice Lamer asks other rhetorical questions using, as his examples, Gypsies who pick pockets, and Black youth who steal cars. Each time I stop the tape and have other students attempt responses.

Justice Lamer's point is that judges should not rely on such stereotypes when they are adjudicating a particular case, and that a judge who stereotypes white police officers as being untruthful is exhibiting a racial bias.[45]

I use this clip to show that people can use different conceptual tools to talk about race. The only conceptual tools that the Chief Justice used were stereotypes. His comments suggest that a judge who adopted stereotypes of a race, as he did of Chinese, should, and could, free himself or herself from the influence of those stereotypes in adjudicating a specific case.

In the class discussion that follows, I attempt to steer away from labelling the comments as racist or not, since such a discussion can go

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[44] Transcribed from videotape of hearing by the author.

[45] Although two other judges of the Supreme Court concurred with Justice Lamer, the majority did not. Madam Justice L'Heureux-Dubé, writing on behalf of herself and three other judges, including the current Chief Justice of Canada, Beverley McLachlin, said that Judge Sparks was justified in making the observations that she did.

> While it seems clear that Judge Sparks did not in fact relate the officer's probable overreaction to the race of the appellant R.D.S., it should be noted that if Judge Sparks had chosen to attribute the behaviour of Constable Steinburg to the racial dynamics of the situation, she would not necessarily have erred. As a member of the community, it was open to her to take into account the well-known presence of racism in that community and to evaluate the evidence as to what occurred against that background.
>
> That Judge Sparks recognized that police officers sometimes overreact when dealing with non-white groups simply demonstrates that in making her determination in this case, she was alive to the well-known racial dynamics that may exist in interactions between police officers and visible minorities.

R.D.S. . v. The Queen, *supra* note 41, at para. 56-57.

no deeper than the "He's a racist – No he's not" dyad. What is more interesting is to look closely at the concepts used by each side and the information on which those concepts were based. This leads to an analysis of the information base for Justice Lamer's statements about the Chinese.

First, he states as a fact that Chinese are "tremendous" gamblers. The only authority he cites is from his personal life – his own law practice, and perhaps visual impressions from his own visits to the Montreal casino. He comes to this conclusion without knowing what percentage of the Chinese population gambles; nor does he reveal what group the Chinese are being compared to – all Canadians who are white; all Canadians who are not Chinese; all Americans?

Second, he states as a fact that the casino is "constantly occupied" by Chinese. Again, his only authority is personal – "judicial cognizance." But what does "constantly occupied" mean? Is it a large percentage, such as 25 percent, or an overwhelming majority, such as 90 percent? Has anyone actually counted, or is the conclusion drawn from a visual impression? How does he know that they are Chinese, as opposed to Japanese, Korean or Vietnamese?

Third, he refers to a "problem" with Chinese gambling at the casino. Gambling at the casino is legal. Does the "problem" arise from too many Chinese frequenting at the casino, relative to non-Chinese? Or is the problem that gambling itself is immoral (although legal) and therefore Chinese are disproportionately immoral?

Finally, Justice Lamer suggests that, even knowing these "facts," he, as a judge, would not take them into account in hearing the case against an individual Chinese person charged with illegal gambling. Here, he seems to assume that a person who gambles legally (at the casino) is more likely to gamble illegally. Or is he suggesting that perhaps Chinese are more likely to engage in illegal gambling than non-Chinese?

Discussions of these questions in the class have raised legitimate reflections on whether an individual who has so many unacknowledged assumptions about a "race" can make a judgement independently of those assumptions. In this discussion, students have pointed out that Judge Sparks herself makes assumptions about white police officers when she says "certainly police officers do overreact, particularly when they are dealing with non-white groups." This point has led to questioning the difference between the assumptions of Justice Lamer and the assumptions of Judge Sparks. Would it have been better if Judge Sparks had followed Justice Lamer's approach and stated that, even knowing her "facts," she, as a judge, would not take them into account in deciding this particular case? Does the fact that the

interactions are between a racialized group and a dominant race make a difference? Why is it that the only stereotypes Justice Lamer raises are derogatory depictions of racialized people? Are there no derogatory stereotypes of dominant "races" – no "white people" problem – that he could have used as examples?

The last question is the most telling. The judge could not come up with derogatory stereotypes of white people because there are none that carry the same weight as the stereotypes of racialized groups. Isabelle Gunning illustrates this well in describing the proposed appointment of African American Lani Guinier as Attorney General of the United States. Guinier's opponents objected to her position on affirmative action, and labelled her a "quota queen." This, Gunning points out, invoked negative cultural myths of the "welfare queen, the lazy, unkept black women [sic] with thousands of children who refuse to work and just exploit the 'good' (read white) people by living off the tax payer provided welfare."[46] Supporters of Guinier, on the other hand, were not able to counter the stereotype because "they had few cultural or historical myths about the brilliance of black women, their reputation for sobriety and fairness, in which to 'nest' their presentation of her as a public figure."[47]

It becomes apparent that the information base used by Justice Lamer was rather thin. Counsel for the youth, on the other hand, do not talk about stereotyping. In their submissions to the court, they talk about the history of Black-white relations in Nova Scotia, about reports documenting racism in the Nova Scotia justice system, and about the possibility of over-reaction by police officers in situations of conflict. They show a much deeper knowledge of the actual racial dynamics. I make it clear that at this point I am not saying that the judge should have had the same level of information as counsel. Rather, I am making the more general point that a person who uses only the concept of stereotyping to discuss racial issues does not have the information base to understand the historical and contemporary social context of race. One could reach this conclusion without having to decide whether or not a person is a "racist."[48]

The experience of talking about race can have a positive impact on practice at the clinic. For example, at the poverty law clinic, we had a client refuse to be represented by a law student of colour. The client himself was of the same national background as the student, but

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[46] Gunning, *supra* note 38, at 73. *See also* Grose, *supra* note 38.

[47] *Id.* at 73.

[48] I do not know about Justice Lamer's actual state of knowledge on racial issues, of course. I should note that his decisions on Aboriginal issues are forward-looking and creative.

he explained that in our judicial system, he, as a person of colour, had a better chance with a white lawyer. The clinic had a policy of not acceding to client requests for students of a certain gender or race, and this case seemed to clearly fall within that prohibition. The law student was being discriminated against because of his race. An approach which conceptualised racism as nothing but discriminatory behaviour may have entirely discounted the client's wishes, for to allow a client of colour to choose the race of his representative, but not to let a white client have the same choice, would be discriminatory against the white client. As it turned out, the discussion on this situation was much more sophisticated. The label "racist" did not really fit with this particular client. He was not refusing the services of the law student because he hated people of that national background. He was motivated by his own experience of being a victim of racism, and it was difficult to argue that his evaluation of the justice system was without merit. We agreed that the clinic's response to the request should confirm that, as a clinic, we had full confidence in the ability of our students, whether or not there was racism in the justice system. But the discussion on how to respond to the request also included a consideration of the social realities as experienced by the client and the feelings of the law student affected.

I do not recall what the clinic's response to the client was in the end, but what is important is not the result, so much as the fact that we were able to carry on a difficult conversation in a collaborative way, looking at the social context of the individuals involved, rather than falling back on the mechanical application of abstract rules. Far from attempting to be colour-blind, students should notice race (as well as gender, sexual orientation, and disability), not to advance stereotypes, but in order to understand the situation of individuals in the community the students are representing.[49]

C. Acknowledging Emotional Engagement

It is not uncommon for lawyers to ask clients, or groups of clients, to put aside their emotions and think rationally. The purpose of the "rational" approach is to have participants discuss the issues within a circumscribed "problem space" using a circumscribed form of conversation. However, this approach does not reflect how everyday problems are actually solved. Problem-solving theorists have found that emotions affect people's choice of goals, definition of the prob-

[49] *See* Cunningham, *supra* note 39, for a recounting of how he and two white law students failed to appreciate the racial dimensions of a case involving an African American driver and state police.

lem and impetus to find a solution.[50] Emotions are not extraneous influences on "pure" problem-solving, but are integral components in the very structure of solving everyday problems. According to Mary Luszcz,

> The social context of problem solving alters and is altered by cognitive structures at the disposal of mature adults. Thus a dialectic is established wherein problem solving entails emotions and pragmatic, as well as logical, dimensions.[51]

In the clinical setting, an intense level of emotional engagement is often unavoidable. Anger, hope, excitement and fear can come from involvement in the work itself, and may be affected by the immersion of the student in a new community. I do not think that personal disclosures in the classroom should be encouraged, and such encouragement might itself create barriers to full engagement for some students. However, an awareness of the role of emotion in solving everyday problems is important for practice in the clinic. Such an awareness can be raised through a discussion of the emotional dimensions of a case. What feelings do the parties have? How do those feelings affect the way they act? And students should feel free to express their own emotional engagement with an issue. Are they outraged? Happy? Saddened? In doing this, the fact that students have their own histories, and their own relationships to the world can be acknowledged, while letting each student control the degree to which these histories and relationships are expressed to the rest of the class.[52]

Emotional pressures are exacerbated once students are in the communities. Non-Aboriginal students may be going to remote First Nation reserves, or Aboriginal students may going into alienating government offices. Some students in the poverty law clinic will be working in an impoverished neighbourhood for the first time. While we, as teachers, should provide institutionalized support in these situations, the most significant support should come from the student group it-

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[50] Jan D. Sinnott, *A Model for Solution of Ill-Structured Problems: Implications for Everyday and Abstract Problem Solving*, in Sinnott, *supra* note 20, at 88:

> The presence of emotional reactions was obvious in this subject's responses throughout the protocol. Emotions and task-unrelated thoughts often were the impetus for choice of goal or problem essence. They kept the solver going, motivating him to continue through the process even when he was temporarily stalled on "hills".

[51] *See* Luszcz, *supra* note 20, at 36.

[52] *See* Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 8 (1989), for a view on the importance of this acknowledgment to those who are not in the mainstream:

> Outside scholars have recognized that their specific experiences and histories are relevant to jurisprudential inquiry. They reject narrow evidentiary concepts of relevance and credibility. They reject artificial bifurcation of thought and feeling. Their anger, their pain, their daily lives, and the histories of their people are relevant to the definition of justice.

self. In the Aboriginal Intensive, where students were in placements thousands of miles apart, we were successful in ensuring on-going e-mail contact for the group. Everyone sent in something at least once a week, sharing news of such events as the weather in Nunavut (snowed-in for three days) or working with an Aboriginal practitioner (driving from hearing to hearing in the middle of the night). Students also contacted each other directly to discuss their own legal and emotional challenges.[53]

If students realize that they need, and can provide, emotional support as part of their work in the clinic, they should be better prepared to deal with emotional dynamics in the community. Students should have some awareness that requiring people to engage solely on a "rational" basis would homogenize interaction by editing out people's individual histories, and individual emotional reactions to the problems being considered. This "rational" approach may be appropriate for legal analysis in the classroom, or at later stages of community decision-making, when technical or strategic decisions are being made, but it will not create the appropriate initial conditions for collaboration. A collaborative process should acknowledge personal identities, race and individual emotional engagement as an integral part of problem-solving. Through such acknowledgment, the law student can help establish an environment that embraces individuals within a collaborative effort, rather than merely organizing disembodied ideas into a plan of action.

V. The Third Skill: Taking a Community Perspective

While the Board of Directors of the clinic in Moosonee decided that we should not take on criminal offences, they made one exception: hunting and fishing charges which could be defended on the basis of rights guaranteed to the First Nations in a 1905 treaty with the Crown.[54] These cases were not taken in order to ensure that Aboriginal clients were afforded the full protection of the criminal justice system, such as the right to remain silent. Rather, the Board wanted to

[53] Student evaluations showed that they found the opportunity to stay in touch very important. In fact, the 12 students from the Aboriginal Intensive in January 2000, who are now scattered across North America, are still keeping the group e-mails going, as of October 2002. They have passed through the travails of their articling year and are now onto marriages, babies and graduate school. At Parkdale Community Legal Services, where the 20 students are together all term, keeping in touch is easier. Even after the term, though, when I see a Parkdale student at the law school, I usually see more than one, because they tend to hang out together.

[54] This area of northern Ontario is covered by the James Bay Treaty (Treaty #9). In this treaty, the Indians purported to "surrender" their interest in the land in return for small reserves, and the right to hunt, trap and fish on their former territory.

raise treaty issues in the courts as part of a larger strategy to have treaty rights recognized in a meaningful way across a wide range of relations between the Crown and First Nations. The treaty was extremely important to the identity of James Bay First Nation communities because it embodied a nation-to-nation relationship with the federal Crown.

My first meeting with a client charged with an offence related to hunting for food, and most subsequent meetings on that case, were attended by a representative of the treaty organization which had established the clinic. The representative was there to ensure that the legal arguments made in the case would reinforce the organization's political positions on treaty rights.[55] I came to understand that my role was not simply to "do" the case, but to move the law toward recognition of a more respectful relationship between governments and the Aboriginal community. Part of my role would be to translate the aspirations of the Aboriginal community into legal language for the court, and, outside of the court, to translate the law into language which would be meaningful in the Aboriginal community.

I had picked up some skills in explaining the law to non-lawyers as a volunteer in a law student clinic. In Moosonee, those skills were adequate for the routine small claims court actions, or social assistance appeals. The utility of those skills ended once I began dealing with treaty rights, and Aboriginal rights in general. Trying to work with the legal principles found in the court cases and legislation did not provide a broad enough palette for discussion of those issues. Often, community meetings would turn toward the assertion of treaty rights that were well beyond anything that I could see in the written treaty itself. When I would try to explain some aspect of the law on the treaty, some people at these meetings would look at me suspiciously, like I was an agent of the government. For example, in a hunting charge, I would focus on whether the treaty right to hunt moose included hunting from the side of the highway. Meanwhile, my clients would be focussing on the right to Aboriginal sovereignty. What was at stake for them was not a point of law, but the survival of their nation.[56]

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[55] There was a potential for the interests of the individual client to diverge from that of the treaty organizations, but in this case, we did not have to face that issue. A defence based on treaty rights did not have a good chance of succeeding. We decided that it was better to plead guilty than risk a stiff fine, and a bad legal precedent. The conflict between an individual interest and a group interest is only one of the many challenges of representing a group of people. I do not address that issue, or the skills that are needed to address that issue, in this paper. A thoughtful discussion on this point can be found in Ellmann, *supra* note 34.

[56] Zuni Cruz, *supra* note 3, at 563 came to a similar conclusion from her work with the

I would have been better prepared for these encounters if, in law school, I had been made more conscious of the fact that, while I was being taught law, I was also being taught to structure reality. In Moosonee, by dissecting a treaty rights dispute and organizing its components into legal categories, I was promoting the structure of reality that I had been taught in downtown Toronto. I began, in problem-solving terminology, with the wrong "problem space." I should have begun by gaining an appreciation of the First Nations' understanding of the dimensions of the dispute. Then I should have analysed how bits and pieces of the law fit into the First Nations' structure of reality. In other words, rather than fragmenting the First Nation's reality to fit into categories of law, I should have fragmented mainstream law to fit into the categories of the First Nations.

In the next section on "speaking plain English" I discuss how legal concepts can be taken apart and presented in a way that highlights issues of importance to the community.

A. Speaking "Plain English"

Lawyers are told to speak "plain English," but what is "plain" to the lawyer may not be at all "plain" to his or her audience. There are a couple of reasons for this difficulty. First, the language of law is complex because the concepts behind the language are often both complex and arcane. Consequently, even though the lawyer is using simplified language, it may be questionable whether or not there is actual communication of meaning. Second, the law is taught as a closed, largely self-sufficient system. The various parts fit together with their own internal logic, and it is difficult to "simplify" without becoming misleading. When trying to explain a legal point, lawyers tend to do nothing more than describe the parts of the system that go together, following the internal logic in that area of law. What is important within that closed legal system may not be important to an audience that has not absorbed, or may not accept, the system as a whole. If that is the case, the audience perceives that the lawyer is failing to communicate.

I have tried a few ways of addressing this problem of communication. The most successful has been the three-stage exercise described below.

Pueblo:

> Successful community lawyering has just as much to do with process as it does with outcome, and when one values community, process becomes critical. Process is critical because for native peoples, community lawyering is about self-determination, both for the community and the individual, about recognizing traditional norms and practices, and about valuing relationships.

The first stage is a very simple interpretation exercise. Students are divided into groups of three. One student ("the lawyer") reads a very short passage in English to a second student ("the interpreter") who must repeat the passage word for word to a third student ("the client") in English. The first student can read the passage only once. While the assignment seems simple, most people cannot do it. For the second passage, the people switch roles. The second piece is a little longer, but I encourage people to read it slower. Because the passage contains some names which may not be familiar, the "interpreters" often get the names wrong. For the third passage, people switch again. The third passage is more complex, and I ask people to break up the text, so that everything is not translated at once. While most of the "interpreters" succeed in repeating word for word (because small chunks are read slowly), the overall effect both for the "interpreter" and the "client" is incomprehensibility. People are not used to listening to fragments of sentences read slowly.[57]

This exercise is important for demonstrating that simply speaking words in a sentence does not necessarily convey meaning. It shows how words, inflection, rhythm and body language convey messages that may or may not be understood. It leads to a discussion of "plain English" as a cultural construct, and shows the extent to which a view of the world, references to events, and the nitty-gritty of daily life all work their way into communications. In my view, students need to *learn* how to speak "plain English" in the context of specific communities by getting a "feel" for the community, the language used, and the public issues. Going physically into communities and meeting people, reading local newspapers, reading graffiti, looking at posters glued onto telephone poles, and sitting in local restaurants, are all

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[57] This exercise is a variation on one used to train interpreters, and I have used it in the poverty law clinic to teach students how to work with interpreters. The actual text can be changed to reinforce legal principles relevant to the class. An example of passages I have used are the following:

> *Passage 1:* Before you opt for a pre-hearing mediation, you should be aware that there is a lack of procedural protections, a lack of ability to enforce the orders and a lack of a transcript.
>
> *Passage 2:* Individuals may file complaints against the police with the Office of the Public Complaints Commissioner or the Police Services Board, but because the police first investigate themselves, complainants often feel that they are the subject of the complaint.
>
> *Passage 3:* In 1996, the Department of Indian Affairs introduced a new housing program for First Nations which was designed to put more emphasis on future planning and community control of reserve housing decisions, and to gradually relieve the reserve housing crisis.

For a description of a similar interpretation exercise, *see* Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 5 Clin. L. Rev. 377, 379-381 (2000).

ways to get this "feel." One interpretation exercise and a visit to a community is not meant to provide students with instant expertise. Rather, because the students in the intensive clinical programmes will spend a few months working in a community, this exercise serves to alert them, at an early stage, to the importance of developing communication skills in the context of their community work.

The second stage in learning to use "plain English" is to try to explain the law. I used the "*Sparrow* test,"[58] a complex technical test which is applied to determine whether a federal or provincial law can restrict an activity by an Aboriginal person. For example, a question might be whether a provincial law could prohibit an Indian from hunting for food. The test involves a number of sub-tests and burdens of proof that shift back and forth between the Crown and the Aboriginal nation.

I gave the students ten minutes to review the test. When they finished looking at their notes (and in a very legal frame of mind), I asked for a "plain English" version of the test. What came from the first two or three students was an explanation of all of the elements of the test, using somewhat simplified language. Even in "plain English," the explanation was long, and very hard to follow. The students had begun from the assumption that the elements of the test were fused into a unitary piece, and needed to be described in that way.

One of the next students described the test using a story to illustrate the legal points. The difference in the impact of the explanation was immediately clear to everyone. I asked the final three or four students to progressively simplify the explanation of the test. In this stage, students tried to convey ideas at a more general level, collapsing the details in the sub-tests. There was no right answer, of course, but the formulation I gave for the simplest iteration was the following:

> Aboriginal people can go to court to complain if they feel that the government is interfering with their rights.

The point of the second stage of the test was to show that a description of the full test, even in simplified language, did not necessarily convey any useful information. Using a story that was easily under-

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[58] In the "*Sparrow* test," a native person must prove that there is an existing Aboriginal or treaty right (and there are complex sub-tests to determine the existence of such rights) and also show that there has been a *prima facie* infringement of such rights by federal or provincial law. If such *prima facie* infringement is established, the onus shifts to the Crown, which must prove that the legislation has a valid objective, and that the legislation is consistent with the honour of the Crown. In determining consistency with the honour of the Crown, the Aboriginal party may raise issues such as the lack of consultation before the infringement or lack of compensation for the infringement. *See R. v. Sparrow*, [1990] 1 S.C.R. 1075.

stood by the audience provided a more accessible vehicle.[59] The ability to collapse the concepts and provide different levels of detail was important for the third stage of the exercise.

In the third stage, through a discussion of Aboriginal perspectives on their relation to the Crown, the students identified what they would want to know before deciding to go to court. As I stated earlier, for many First Nations, the frame of reference for their relation to Canada is the recognition of First Nation sovereignty. None of the students, in describing the *Sparrow* test, had mentioned anything about sovereignty because the actual test does not mention sovereignty. The test did not mention sovereignty because, before laying out the test, the court had already stated that the Crown had sovereignty over all lands in Canada, including Aboriginal lands. A First Nation that invoked the *Sparrow* test, then, would be invoking a test that was built on an assumption that was fundamentally at odds with the First Nation's view of its place in Canada. For a lawyer not to raise this as an important issue for the First Nation would be irresponsible, but the issue would only be obvious if the lawyer had begun analysis of the problem from the First Nation perspective.

The class discussion on this point prompted thought about other issues that the First Nation should know about, including the fact that it must expose its traditional stories and its Elders to cross-examination and possibly to negative judgments on their credibility. Again, as these matters were of fundamental importance to the First Nation, they would be central to the litigation strategy. Yet they were not issues that were relevant to a more narrow "legal analysis." In this final stage, I tried to show the difference between beginning from a legal frame of reference and beginning from an Aboriginal frame of reference. Even though the facts were the same, and the law considered was the same, the issues were constructed in a different way so that the priorities were also different.

B. Explaining A Different Reality

The "speaking plain English" exercises described above were meant to help students develop the skills that would allow them to discuss law in a way that was relevant to the reality as perceived by the community. The exercises described below are aimed at the con-

[59] This exercise accomplished four teaching objectives. First, it drove home the elements of a complex but important technical legal test. Second, it gave students practice in articulating legal tests in "plain English." Third, it turned their minds to consciously varying the level of detail depending on their audience. And finally, it encouraged collaboration and trust because each student was building and improving on what the students before had said.

verse situation. What skills can assist the student to send a message about community perspectives to those outside of the community?

In practice, these "community perspectives" rarely present themselves as fully developed nor as uniformly accepted throughout the community. The first step in the process of developing a message is to assist in facilitating consensus on the problem, and the means for addressing the problem.

To teach facilitation, I have students form a circle. I pose a fairly broad legal issue, and ask three students to comment on that issue.[60] The fourth student summarizes what the first three have said, and then poses a sub-question which arises from the comments of the previous students. The next three students comment on the sub-question. The fourth student then summarizes and poses a sub-question for the following three students. The exercise requires students to summarize what others have said – not what they personally think – and gives them practice listening with sufficient focus to be able to identify further issues. This approach puts the emphasis on an organic process for coming to a rough consensus, rather than on an adversarial approach which emphasizes winning arguments.

The second step is to develop the message itself. For this, students need to appreciate that the issues must be expressed using language and a constellation of cultural images which are not "legal," but yet must be consistent with a "legal" position. The following "slogan exercise" helps students formulate a message using popular language and popular images.[61] In this exercise, students are given a contentious problem – an organized objection to rent increases, or opposition to oil exploration on native lands – with instructions on how the client group perceives the issue. The exercise begins with a brief discussion about the different groups affected by the dispute. The list of those affected goes well beyond the parties that would appear in court, to include consumers, business groups, government and the media.[62] Students are then divided into groups of four or five, given markers and paper and told to come up with a slogan and a visual image to describe their problem, keeping in mind the many audiences that need to be addressed. After about half an hour, a spokesperson for each group stands up and explains how the message chosen by the group is consistent with both the demands of the group, and with their

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[60] The facilitation exercise is an excellent vehicle for addressing a complex legal or policy issue. Because students must build on what previous students have said, they are forced to think creatively about a variety of perspectives on the issue.

[61] The slogan exercise helps students work together; helps them connect legal theories to community perspectives and teaches drawing.

[62] This process is similar to the "difference analysis" described by O'Leary, *supra* note 38.

"legal" position. The latter requirement – that the slogan be consistent with a proposed legal course of action – is part of what makes the exercise challenging. If the legal case is framed too narrowly or technically, it may conflict with the sweeping slogan desired by the group. After the explanation of the message by the spokesperson, I approach with a microphone and ask the student to respond to a difficult question that might be posed by a hostile reporter. The spokesperson must then quickly answer in a way that is consistent with the slogan, the demands of the community, and the "legal case."

This whole exercise is a lot of fun. The challenge of explaining everything about a case in a fifteen-second sound bite is not appreciated until it is attempted. The point of the exercise is not to raise the expectation that students will do the talking at press conferences. It is very important that community members themselves speak on their own behalf.[63] However, students may have an important role to play in preparing the message or in preparing the community spokespersons.

The third step is to delineate the role of the student or lawyer when a group wants to "go public" and there is a possibility of a confrontation. In my Aboriginal law practice, I was asked to advise on road blockades and other forms of civil disobedience. Consequently, I decided to teach the law around those situations in the Aboriginal Intensive. While there are no unambiguous guidelines for the lawyer's role, two articles provide good starting points for an exploration of the issue. The first is by Nancy Polikoff, a lesbian activist who participates in civil disobedience herself – but not when she is in her role as lawyer to the group. In her article, Polikoff also points out situations in which the lawyer's tendency for order may conflict with the priorities of the activists.[64] The second article, by William Quigley,

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[63] Community organizer Barbara Major, quoted in Quigley, *supra* note 9, at 463:

> The community needs to feel its own power and continue to be built back up in the sense that says you not only have the right to speak for yourself, but you can speak for yourself. The community needs to be allowed to demonstrate as many times as possible its capabilities and abilities to do and to be itself, its own power source, its own leadership.

[64] Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443, 448 (1996).

> I share with my civil disobedience clients a common experience of marginality as a lesbian or gay person in an overwhelmingly heterosexual world. This common experience of marginality blurs, however, when I function as their lawyer. As a lawyer I am an officer of the court, an insider entitled to civility of treatment, sometimes even respect, by virtue of my occupation and its role, regardless of my political beliefs or sexual orientation. At the moment my clients intensify their outsider status as lesbians and gay men by becoming lawbreakers, I remove a layer of my own outsider status as a lesbian and gain legitimacy by acting within the legal system as their attorney.

describes the importance of allowing community members to take the lead in confrontational situations, even when the lawyer is not comfortable with the tactics proposed.[65] Whatever the arrangement, the members of the community and the legal advisor should clarify their roles prior to the event.

The discussion of "plain English," constructing slogans, and the role of lawyers in confrontations are all directed to the task of fragmenting the coherency of the law that we are taught in law school. Rather than viewing law as an overriding framework for determining what action to take, community-based lawyers should begin from the reality perceived by the communities which they represent. Lawyers should use law as a tool for advancing community goals, not as a blueprint for re-constructing community realities.

CONCLUSION

By the time I left Moosonee, I knew why the community leaders did not want to make the right to remain silent a priority. The existence of social and economic conditions which gave rise to criminal proceedings was closely associated with the political dominance of a settler society. The settler society's dominant mechanism of enforcement – the judicial system – took away the authority of community leaders to address problems in the community and placed the authority in the hands of black-robed professionals from the south. These professionals were, for the most part, well meaning. They perceived themselves to be trying to help a community in distress and they sighed deeply and often at the monthly parade of guilty pleas.

Several years after I left Moosonee, Elders on a reserve further north on the James Bay coast began hearing cases on their own. Their community proceedings had no lawyers, no Criminal Code, and no English. Although this initiative had the official support of the justice system, it was viewed with great trepidation. Judges and lawyers worried about the danger of arbitrary decisions, the lack of clear procedures and the absence of counsel. One of the legal aid defence

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[65] Quigley, *supra* note 9, at 475-476.

> Since some lawyers have substantial experience in controlled legal confrontation, there is the tendency of the lawyer to try to control and direct the confrontation to conform to the confrontation style to which the lawyer is accustomed. . . . This tendency usually seeks for more polite, ordered confrontation that follows the rules of polite, ordered society. . . . Subjecting the powerless to the rules of the powerful in a confrontation over the just reallocation of power is contradictory and counterproductive. This is not to say that thoughtless stridency is the best approach to confront the powerful, rather the lawyer must be prepared for the group to consciously adopt and utilize methods of confrontation which the lawyer would never choose for herself.

lawyers flew up to the community to observe a hearing, conducted in Cree. He was surprised by his own finding.

> As you are aware, I have attended in the Northern Courts as Duty Counsel for the past six or seven years and as such am well acquainted with the various Courts in the Northern communities. I have seen on many occasions the veiled and often open contempt with which the natives hold the judicial system which is obviously viewed by many as a continuing aspect of white supremacy and dominance. This lack of respect for the Court is quite apparent from the demeanour of witnesses, onlookers and Defendants in many of the cases.
>
> However, during the Elders Court, it became quite apparent to me that the Elders took their job very seriously. They conducted the Court in a manner that was totally unique and foreign to my experience as an Ontario lawyer. They did not ask for example the Defendants how they pleaded but simply asked them as to whether or not they did what was alleged. This direct confrontation elicited from most what I perceive to be an honest answer (in all the cases that I observed the answer was in the affirmative) and the Elders proceeded to lecture the accused as to how they had embarrassed the community at large, their families in particular and themselves, i.e., the Defendants, even more specifically. The accused obviously held the Elders in respect and certainly displayed shame and remorse that I had not observed in my other experiences in the Courts in the North generally and in this one in particular.[66]

This initiative fell apart after a few years, partly due to the institutional strains of co-ordinating with the mainstream system, and partly due to internal community pressures. However, things have not stood still in James Bay. The communities now operate their own police force, child welfare agency and hospital. One of the first graduates of the Intensive Programme in Aboriginal Lands, Resources and Governments has returned to her community to open up the first private law practice in Moose Factory.

The communities in James Bay are very different from the poor communities in downtown Toronto. The priorities, internal dynamics and social forces affecting those urban communities require lawyers to adopt different tactics and take different political perspectives. However, the sensibility that lawyers should have when working in impoverished urban communities are similar. The lawyering skills transmitted through the conventional law school courses do not prepare students for this type of community practice. In order to transmit community lawyering skills, clinical courses should utilize a

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[66] ROYAL COMMISSION ON ABORIGINAL PEOPLES, BRIDGING THE CULTURAL DIVIDE 107 (1996).

counter-pedagogy that allows students to absorb the lessons of collaborative relationships, the recognition of personal identity and race, and the ability to take community perspectives. By doing so, we will be preparing future lawyers to play a positive role in the work for social justice.